

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Applications of)

THE LUTHERAN CHURCH/
MISSOURI SYNOD)

For Renewal of Licenses of
Stations KFUD/KFUD-FM
Clayton, Missouri)

MM Docket No. 94-10

FCC File Nos. BR-890929VC
BRH-890929VB

DOCKET FILE COPY ORIGINAL

To: The Honorable Arthur I. Steinberg
Administrative Law Judge

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF THE LUTHERAN CHURCH-MISSOURI SYNOD**

**THE LUTHERAN CHURCH-MISSOURI
SYNOD**

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September 6, 1994

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OF THE LUTHERAN CHURCH-MISSOURI SYNOD**

The Lutheran Church-Missouri Synod (the "Church"), by its attorneys and pursuant to Sections 1.263 and 1.264 of the Commission's Rules, hereby submits its Proposed Findings of Fact and Conclusions of Law in the above-referenced proceeding.

I. Preliminary Statement

1. By Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, 9 FCC Rcd 914 (1994) (the "HDO"), the Commission designated for hearing the Church's license renewal applications filed September 29, 1989 for stations KFUD(AM) and KFUD-FM, Clayton, Missouri (sometimes collectively referred to as

the "Stations" or "KFUO"). The HDO specified the following issues:

- (a) To determine the extent to which the licensee of Stations KFUO/KFUO-FM complied with the affirmative action provisions specified in Section 73.2080(b) of the Commission's Rules, 47 C.F.R. §73.2080;
- (b) To determine whether the licensee of Stations KFUO/KFUO-FM made misrepresentations of fact or was lacking in candor in violation of Section 73.1015 of the Commission's Rules, 47 C.F.R. §73.1015, with regard to the stations' EEO program and documents submitted in support thereof;
- (c) To determine whether, in light of evidence adduced pursuant to the foregoing issues, a grant of the subject license renewal applications would serve the public interest, convenience and necessity.

The burden of proceeding with the introduction of evidence and the burden of proof on all issues were placed upon the Church. Id. at 926. "[S]o as to maintain the fullest possible flexibility of action," the Commission also ordered the Presiding Judge to determine whether an Order for Forfeiture in an amount not to exceed \$250,000 should be issued against the Church for the willful and/or repeated violations, if shown, of Sections 73.2080 and 73.1015 of the Commission's Rules. Id. at 927.

2. On March 25, 1994, in response to a Motion to Modify Hearing Issues filed by the NAACP, the Presiding Judge modified Issue (a) to read as follows:

- (a) To determine the extent to which the licensee of Stations KFUO/KFUO-FM complied with the nondiscrimination and affirmative action provisions specified

in Sections 73.2080(a) and 73.2080(b) of
the Commission's Rules, 47 C.F.R.
§73.2080.

The Lutheran Church/Missouri Synod, Memorandum Opinion and Order,
FCC 94M-191, MM Docket No. 94-10 (released March 25, 1994).

3. The prehearing conference was held on March 16, 1994.
At that conference, it was stipulated that the license term under
review for each station ran from February 1, 1983 to and
including February 1, 1990 (the "License Term"). (Tr. 14).
Hearing sessions were held on June 20-24, 1994. At the end of
the June 24, 1994 hearing session, the record was closed. (Tr.
1117).

4. At the outset, it is important to stress that the
Church, which has been a radio station licensee for some seventy
years, has the highest respect for the Commission and the public
interest standard under which all broadcast licensees operate.
In addition, the Church firmly believes that all persons are
equal in the eyes of God, and fully supports the goals underlying
the Commission's equal employment opportunity rule. This
conviction is demonstrated by the fact that the Stations have
recruited, hired, and employed minorities during the License
Term. The Church also fully supports the need for honesty and
candor between licensee and government. At no time did the
Church or any of its employees attempt to mislead the Commission.
Any inaccuracies in the voluminous filings were purely
unintentional.

5. Thus, this is not a case of a licensee thumbing its
nose at authority. Rather, this case centers on whether the

Church's EEO program can be faulted given the Commission's evolving standards of review and enforcement under its EEO rules during and after the License Term, given the limited guidance offered by the FCC's decades old King's Garden^{1/} case, and given the impact of the U.S. Supreme Court's Amos^{2/} case on King's Garden. More specifically, the question is, given these circumstances, whether the Church can be faulted for (1) maintaining a decades old, largely part-time, work study/internship program for its affiliated seminary students; (2) utilizing its minority and non-minority station employees and Church affiliated sources as recruitment sources; and (3) preferring applicants for sales positions at KFUD-FM that possessed a knowledge of classical music. The Church submits that it acted reasonably and in good faith in all respects. Accordingly, the Presiding Judge is respectfully requested to find in favor of the Church on all designated issues; grant the applications for renewal of licenses of KFUD(AM) and KFUD-FM for full remaining license terms with, at most, EEO reporting conditions; and decline to issue any order for forfeiture.

^{1/} King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974).

^{2/} Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

II. Proposed Findings of Fact

A. BACKGROUND

1. The Church's Mission for the Stations

6. The Church is the licensee of KFUD(AM) and KFUD-FM, licensed to Clayton, Missouri. KFUD(AM) went on the air in 1924 and is a 5,000 watt daytime only AM station operating noncommercially on 850 kHz and broadcasting religious programming. KFUD-FM went on the air in 1948 and is a full-time Class C commercial FM station operating on 99.1 MHz and broadcasting classical music with a religious orientation and some religious programming. (Church Ex. 1, pp. 1, 3, 7; Church Ex. 4, p. 3; Church Ex. 7, p. 2).

7. The Church, either directly or through Concordia Seminary ("Concordia Seminary" or the "Seminary"), has been the owner and operator of KFUD(AM) since 1924. KFUD(AM) has the distinction of being the "world's oldest religious broadcast facility"; it was the first daily station to come on the air with and continuously maintain a religious format. In 1948, the Church put KFUD-FM on the air. KFUD-FM is the only full-time classical music format station in the St. Louis radio market. (Church Ex. 1, p. 1; Church Ex. 7, p. 4). The studios of both KFUD(AM) and KFUD-FM are located in the same building on the campus of the Church's Concordia Seminary in Clayton, Missouri. (Church Ex. 4, p. 3).

8. In the Church's view, both of the Stations are dedicated to the task of carrying out in their way the Great

Commission which Christ gave to His Church -- to preach the Gospel to every creature and to nurture and serve people in a variety of ways. (Church Ex. 7, pp. 1-2; Church Ex. 4, pp. 2-3). During the License Term, KFUA(AM)'s format was religious and KFUA-FM broadcast sacred as well as non-liturgical classical music. For example, KFUA-FM played Bach, Schuetz, Handel, Mendelssohn and others and related them to the Church year. (Church Ex. 4, p. 3; Church Ex. 4, Att. 1; Church Ex. 7, pp. 3, 5-6). Both of the Stations also served the Church's mission by giving professional help and training to the students of Concordia Seminary. (Church Ex. 7, pp. 5-6).

2. History of the Church's Involvement in Broadcasting

9. On February 19, 1923, the Chairman of the Board of Control of Concordia Seminary proposed the idea of operating a radio station either at the Seminary or at Concordia Publishing House. The funds for construction and the initial operating expenses of KFUA(AM) came from Concordia Seminary and the Lutheran Layman's League (the "Lutheran League"), as well as from the St. Louis Lutheran Publicity Organization and the Walther League. The students of the Seminary, in addition to raising \$1,500 in donations from friends and relatives, also appropriated \$1,000 from the student treasury to help build the radio station. (Church Ex. 1, pp. 2-3).

10. Station KFUA(AM) went on the air on December 14, 1924. It was officially dedicated to the "glory of God" during an evening broadcast on that day from an attic studio at the

Seminary, at that time on South Jefferson Avenue in St. Louis. The station's commitment was to promote Gospel outreach and service to the listening audience through religious programming and "serious" music. The founders of the station were proponents of a ministry to the "whole man" and believed classical music was important to that ministry. Martin Luther had said: "After theology, I accord to music the highest place and greatest honor." Throughout its early years, the Church believed that KFUD(AM) was following Luther's tradition by using fine classical music, much of which was composed for use in church liturgy, to glorify the name of Jesus Christ. (Church Ex. 1, p. 3; Church Ex. 7, p. 2).

11. KFUD(AM)'s first license was issued to Concordia Seminary by then Secretary of Commerce Herbert Hoover on January 29, 1925, for a term expiring January 25, 1926. (Church Ex. 1, p. 3; Church Ex. 1, Att. 1). The station began broadcasting with a 500 watt transmitter at 550 kHz, sharing that dial position with Station KSD(AM), St. Louis, Missouri. (Church Ex. 1, p. 3).

12. In 1924, when KFUD became operational, there were fewer than 600 radio stations in the United States and the station's broadcast signal extended from the east coast to the Rocky Mountains at certain times during the broadcast day. With the rise in the number of broadcast stations and increased industry regulation through the Federal Radio Commission (the predecessor to the Federal Communications Commission), the broadcast range of KFUD(AM) gradually diminished. Also, initially the station broadcast only two programs per week, on Sunday and Wednesday

evenings. By 1928, KFUE(AM) was broadcasting thirty-four programs per week, approximately twenty-one hours of programming. (Church Ex. 1, pp. 3-4).

13. In 1926, Concordia Seminary relocated from Jefferson Avenue in south St. Louis to a new campus in suburban Clayton, Missouri, requiring relocation of KFUE(AM). The problem of moving the radio facility was resolved when the Lutheran Layman's League offered to rebuild the station at the new Seminary and to provide funds for annual maintenance. In conjunction with the relocation, on June 15, 1926, the Lutheran Layman's League submitted a resolution to the Church in Convention (i.e., the Church body in convention) proposing that the Synod take over the station with control in the hands of the Board of Control of Concordia Seminary. KFUE(AM)'s new facility at Concordia Seminary's Clayton campus was dedicated on May 29, 1927. At that time, KFUE began operating with a 1,000 watt transmitter. (Church Ex. 1, p. 4; see Tr. 720, 850 (defining Synod)).

14. In November 1940, the Commission approved the Church's application to operate on 830 kHz and for an increase in power to 5,000 watts. A few months later, the FCC modified KFUE(AM)'s license to 850 kHz, the position it occupies on the dial today. (Church Ex. 1, p. 7).

15. In 1948, the physical plant for KFUE(AM) was enlarged, and the Church, then called the "Evangelical Lutheran Synod of Missouri," applied for and received a license for Channel 256, 99.1 MHz in the FM band. The new station's call letters were KFUE-FM. Shortly thereafter, pursuant to an application, the

licensee changed its name to the current "The Lutheran Church - Missouri Synod." With its new FM station, the Church gained the ability to broadcast around the clock. (Church Ex. 1, p. 7). From 1948 until 1974, religious and classical music programming was simulcast on KFUD(AM) and KFUD-FM, both of which were operated on a noncommercial basis. After 1974, because of a change in FCC rules, KFUD(AM/FM) simulcast only on weekends, but both Stations remained noncommercial until 1983, when KFUD-FM began accepting advertising. KFUD-FM became a full power stereo broadcast operation in 1975, operating at 100,000 watts. (Church Ex. 7, pp. 2, 5).

16. In the 1930's and 1940's, KFUD(AM) originated and broadcast "The Lutheran Hour," a weekly national radio program. Subsequently, the KFUD Extension Service was created. The Extension Service produced and distributed religious radio and television program materials for use by broadcast and non-broadcast outlets and by parish pastors over stations in their localities. (Church Ex. 7, p. 3).

17. KFUD's Extension Service was instrumental in developing "Portals of Prayer," a daily devotional program offered free of charge for use by radio stations, nursing homes, hospitals, schools, prisons and other institutions. By 1983, "Portals of Prayer" was broadcast in 700 locations nationally and internationally. In the 27 years since its inception, nearly five million recorded copies of "Portals of Prayer" have been distributed to outlets worldwide. The "Portals of Prayer" program messages have been broadcast to at least four continents.

In 1988 the name of the program changed to "By The Way." (Church Ex. 7, pp. 3-4).

18. In 1978, KFUD's first Radio Choir was formed using volunteer musicians from the KFUD listening area. The Choir performed regularly on KFUD(AM) during the License Term, appeared in public performances and recorded several albums. (Church Ex. 7, p. 4).

19. Beginning in April 1981 and continuing into 1983, KFUD sponsored the weekly 30-minute sacred music program "JOY." Distributed to some 300 radio stations, including those in foreign countries, "JOY" featured Christian choral music along with commentary and was designed to highlight scripture lessons. In 1982, KFUD initiated the Bible reading program "HIS WORD." These 10-minute daily radio programs contain readings from the New International Version of the Bible along with commentary and music. Production, distribution and funding for these and other programs were provided by KFUD. (Church Ex. 7, p. 4).

20. Over the years KFUD has provided the following:

- a radio work/study training program for future pastors;
- workshops in radio ministry for parish pastors;
- resource materials (tapes, records, scripts, etc.) for congregations wishing to extend their ministries through local radio programming;
- assistance to the Church's synodical boards, institutions, agencies and other organizations in the development and production of radio programs and other audio materials; and

- development of new radio programs in varying formats (devotionals, children's programming, drama, sacred music, etc.) for sharing the Gospel and furthering the work of the Church.

(Church. Ex. 7, pp. 4-5).

21. In March 1983, one month after the beginning of the License Term, the Church decided it would need to accept commercials on the FM station. In the Church's view, voluntary contributions and bequests -- which had been the source of both Stations' revenues up until then -- were simply insufficient to support the Stations' operations. (Church Ex. 7, p. 5; see Church Ex. 4, p. 6 ("The Stations continued to struggle financially throughout the License Term"); Church Ex. 4, Att. 5). Throughout the License Term, however, members of the Board of Directors of the Church debated whether the Church should engage in commercial endeavors, because the Directors believed that the main function of both Stations remained as a ministry to support the Church and to nurture Christian faith. (Church Ex. 7, p. 5; see NAACP Ex. 28 (1989 management report emphasizing religious mission of both stations); NAACP Ex. 27 (1988 report by KFUD-FM's program director to Stations' management stressing continuing religious mission of FM station); M.M. Bur. Ex. 24 (1987 management report to same effect)).

22. The Church's Stations have had a spotless record over the last 70 years. With the exception of this proceeding, neither the FCC nor its predecessor agency has ever cited either of the Stations for any violations of rules or policies. (See Church Ex. 7, p. 2).

3. Organization of the Church's Broadcast Ministry

23. From the beginning of the License Term until 1986, the Stations were operated by the Church through its Board for Lutheran Radio, a Board directly accountable to both the Church's Board of Directors and the Church's membership in Convention. A general manager of both Stations served as the "Chief Executive Officer" of the radio operations. Because of the religious nature of the radio operations, the general manager was required to have theological education and expertise (the general manager of both Stations from January 1983 to January 1986 was in fact a Church minister, Reverend Roger Abatie). During that time, the Executive Director of the Church's Board for Communications Services (the "BCS"), Reverend Paul Devantier, served as a liaison to the Stations. (Church Ex. 7, p. 7; Church Ex. 7, Att. 1; Joint Ex. 1).

24. In 1986, the Church assigned day-to-day supervisory responsibility over the Stations to the BCS. The Board for Lutheran Radio became a standing committee of the BCS. As Executive Director of the BCS, the Reverend Paul Devantier became "CEO" of the Stations. Thus, since 1986, the requirement that the top staff position at the Stations be filled by someone with theological education and expertise has been fulfilled through the Executive Director position. As the Stations' CEO, Reverend Devantier visited the Stations approximately once a week to oversee the Stations and to ensure that the Church's policies were observed. Reverend Devantier reported to the seven member

BCS, which in turn reported to both the Church's Board of Directors and its Membership in Convention. (Church Ex. 7, pp. 7-8; Church Ex. 4, p. 11).

25. In a staff reorganization at the Stations in 1987, the position of Director of Broadcast Ministries was created to supervise a separate general manager for each radio station and report directly to Reverend Devantier. (Church Ex. 7, p. 8; Church Ex. 7, Att. 1). The only person to hold the position of Director of Broadcast Ministries during the License Term was Kenneth Lombardi, who held the position from approximately July 1987 to November 1989. (Joint Ex. 1).

4. The Role of Concordia Seminary at the Stations

26. The HDO raised questions about the relationship between the Church's Concordia Seminary and KFUD,^{3/} a relationship which has existed since the inception of KFUD(AM). The Stations and the Seminary have had a close relationship which, in the Church's view, has allowed each institution to play an integral role in the achievement of the other's goals. (Church Ex. 7, p. 6).

27. The relationship between the Stations and the Seminary has been well known to the Commission and to its predecessor agency. KFUD(AM)'s first license was in fact issued to the Seminary itself in 1925. (Church Ex. 1, Att. 1; see supra ¶ 11). FCC records reflect that KFUD's licensee during the late 1920's was the "Evangelical Lutheran Synod of Missouri, Ohio, and other

^{3/} HDO, 9 FCC Rcd at 921-22, 925.